No. 14327

In the United States Court of Appeals for the Ninth Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I

Appellees' contention that the *Womack* and *Hanson* decisions are no longer controlling and authoritative is expressly refuted by the legislative reports on the 1949 amendments to the Act and by recent decisions of the courts

Appellees rely extensively (App. br. pp. 29–33) on the Supreme Court's decision in *McLeod* v. *Threlkeld*, 319 U. S. 491 as overruling this Court's decision in *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101. But the *McLeod* case, as the Supreme Court explicitly stated, was not concerned with the scope of "production of goods for commerce" phase of coverage under the Fair Labor Standards Act, since McLeod's duties (cooking food for a railroad maintenance of way crew) were "completely outside that clause" (319 U. S. at 493). And indeed the Supreme Court cited (319 U. S. 493, 501) with ap-

parent approval both the *Womack* case and the Eighth Circuit's decision in *Hanson* v. *Lagerstrom*, 133 F. 2d 120 holding cookhouse employees of the type here involved to be engaged in the "production of goods for commerce." The inapplicability of the *McLeod* case to cases concerned with the "production of goods for commerce" phase of coverage such as is involved in the instant case is conclusively demonstrated by the Supreme Court's subsequent decision in *Armour & Co.* v. *Wantock*, 323 U. S. 126, where the Court expressly ruled that:

> *McLeod* v. *Threlkeld*, * * * which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce (323 U. S. at 131).

That the "production" phase of coverage continues to offer a wider basis for coverage of such employees even under the amended definition is apparent from recent decisions of the courts. See *Hawkins* v. *E. I. DuPont De Nemours & Co.*, 192 F. 2d 294 (C. A. 4); *Tobin* v. *Cherry River Boom & Lumber Co.*, 102 F. Supp. 763 (S. D. W. Va., 1952); and *Tobin* v. *Promersberger*, 104 F. Supp. 314 (D. Minn., 1952).

And as stated in the Government's main brief (br. pp. 28–30), the legislative reports on the 1949 amendments to the Act show clearly that Congress intended to continue coverage of employees of the type involved here and in the *Womack* and *Hanson* cases. Indeed, express approval was given to the *Womack* and *Hanson* cases in the Report of the Majority of the Senate Conferees. Appellees attempt to minimize the significance of this Report by referring to it as "merely a statement of three Senators" submitted after the adoption of the conference bill. (App. br. p. 24.) However, while admittedly there was some disagreement among the Senators concerning the timeliness and effect of the Report, there can be no doubt that it represents the views of the majority of the Senate con-

ferees, who were the principal sponsors of the bill.[1] And its authoritative force as a significant part of the legislative history of the 1949 amendments to the Act is beyond question. This is clear from the following excerpts from the debates concerning the submission of the Report:

> Mr. PEPPER. * * * I offer the statement, which I now again tender on behalf of three of the Senate conferees, *being a majority of the Senate conferees, who were the principal sponsors of the bill,* and who were active in the conference, namely, the chairman of the Committee on Labor and Public Welfare, the distinguished Senator from Utah [Mr. Thomas], the ranking Democratic member of the committee in the conference, the eminent Senator from Montana [Mr. Murray], and the senior Senator from Florida, who was also one of the sponsors of the bill, and was chairman of the subcommittee which handled the legislation in the committee (95 Cong. Rec. 14870, Oct. 18, 1949). [Emphasis added.]
>
> * * *
>
> Mr. MORSE. * * * We are dealing here with a conference report. We are dealing with the remarks, the opinions, and the views of the majority of the Senate conferees set out in their report on the bill as it came out of conference. As a matter of legislative history, those views may become of great importance in the future interpretation of the law by the courts of the land (95 Cong. Rec. 14871).
>
> I wish to say to my friend from Nebraska that I am not at all interested in whether or not the views of a majority of the Senate conferees on any bill are acceptable to or are agreed to by any staff member of any committee of the Senate. Mr. Shroyer may be acting for the Senator from Ohio [Mr. Taft] but he cannot act for the Senator when it comes to having his views bind the Senate when this conference report prepared by a

[1] "It is the sponsors that we look to when the meaning of the statutory words is in doubt." See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394–395, rehearing denied, 341 U. S. 956.

majority of the Senate conferees at the time that the Senate accepts the report of interpretation as it is now submitted by the Senator from Florida [Mr. Pepper]. I am not interested in what Mr. Shroyer's views are with respect to this report. I am interested in what the majority of the Senate conferees say about the minimum wage bill in their report on it.

Mr. WHERRY. Mr. President——

Mr. MORSE. I will not yield at this point.

I wish to say to the Senator from Florida that when a majority of the Senate conferees make a report as to their views with respect to a bill which is being reported by the conferees, that report should stand on its own footing. * * * It is the report of the majority of the conferees. It is not the report of the individual conferees (95 Cong. Rec. 14871, Oct. 18, 1949).

* * *

Mr. PEPPER. * * * When the courts and the Administrator subsequently come to consider this subject, they will have the Congressional Record in the Senate and in the House. They will have the statement of the House managers. They will have the statement of the majority of the Senate conferees; and they will have the individual statement of the Senator of Ohio, to the extent he desires to offer it. If the Senator from Vermont [Mr. Aiken] cares to make any statement, that will be available. All of it, taken together, will constitute part of the historical background of the legislation.

* * *

Mr. WHERRY. * * * In view of the last statement made by the Senator from Florida, that this statement will go in the Record as a statement of the majority of the conferees, I have no objection to it on that ground * * * (95 Cong. Rec. 14871, Oct. 18, 1949).

For a complete report of the debates and circumstances surrounding the submission of the Report see 95 Cong. Rec. 14868–14874, October 18, 1949.

II

The sections 13 (a) (1) and 13 (a) (2) issues are not presented for decision on this appeal since the court below made none of the findings requisite to their applicability

In addition to controverting coverage under the Act, appellees claim exemption from the Act under Sections 13 (a) (1) and 13 (a) (2) relating to employees employed in a "local retailing capacity" or by a "retail or service" establishment (App. br. pp. 58–73). But the court below made none of the factual findings which are requisite to a determination of these exemptions, this being deemed unnecessary in view of the court's disposition of the case on the coverage issue (Findings and Conclusions R. 52–74). It is the Government's contention therefore, that these undecided exemption issues are not presented for decision on this appeal.

The 13 (a) (2) exemption is essentially the exemption provided in the original 1938 Act, with the addition of a detailed definition. The definition prescribes four tests:

> 1. The establishment must be engaged in making sales of goods or services or of both.
>
> 2. Fifty percent of the establishment's annual dollar volume of sales of goods or services must be made within the State in which the establishment is located.
>
> 3. Seventy-five percent of the establishment's total annual dollar volume of sales of such goods or services must not be for resale.
>
> 4. Seventy-five percent of the establishment's annual dollar volume of sales of goods or services must be recognized as retail sales in the particular industry.

The Section 13 (a) (1) exemption provides an exemption for "any employee employed in a * * * local retailing capacity" as such term is defined and delimited by regulations of the Administrator. The Administrator's regulation (29 CFR, 1953 Supp., 541.4) defines an employee employed in a "local retailing capacity" as one—

> (a) who customarily and regularly is engaged in—
>
> (1) making retail sales of goods or services of

which more than 50 percent of the dollar volume are made within the State where his place of employment is located, or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

(b) whose hours of work of a nature other than those described in paragraphs (a) (1) or (a) (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer.

It will readily be seen that determination of whether or not the messhall and lodging facilities constitute a "retail or service establishment" under Section 13 (a) (2), or whether the employees operating such facilities meet each of the conjunctive requirements for the exemption under Section 13 (a) (1), presents a multiplicity of factual issues which have not been resolved by appropriate findings of the district court as required by Rule 52 (a) of the Rules of Civil Procedure.[2] Directly in point here in connection with the applicability of the Section 13 (a) (2) exemption is the case of *Tobin* v. *Celery City Printing Co.,* 197 F. 2d 228 (C. A. 5) where the district court had made no finding that 75 percent of the establishment's sales were "recognized as retail sales in the particular industry." The Fifth Circuit, pointing out that this requirement is "one of the prerequisites of such exemption" reversed the decision of the district court holding the exemption applicable and remanded the cause to the district court "to further consider the question of appellee's exemption as a retail or service establishment."

In view of the lack of essential findings with respect to both the Sections 13 (a) (2) and 13 (a) (1) exemptions, the language employed by this Court in *Paramount Pest Control Service* v. *Brewer,* 177 F. 2d 564, would seem particularly apt in the instant case. It was there stated:

[2] 28 U. S. C. A., Rule 52 provides: "In all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. * * *. Findings of fact shall not be set aside unless clearly erroneous, and *due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.*" [Emphasis supplied.]

> The law is clear that a trial judge is not always required to make findings upon all factual issues that are tendered or that arise in a case. *Kustoff* v. *Chaplin*, 9 Cir., 1941, 120 F. 2d 551. Nevertheless, where * * * the record shows that there has been an omission in the trial court to find indispensable facts upon which the controversy in law depends, the Court of Appeals will remand the case to have the essential findings supplied by the trial judge. *Hunter* v. *Scruggs Drug Store, Inc.*, 4 Cir., 1940, 113 F. 2d 971; see also, *Gillis* v. *Gillette*, 9 Cir., 177 F. 2d 7 (*id.* at 565).

To the same effect are the decisions of this Court in *Marlborough Corp.* v. *United States*, 172 F. 2d 787; *United States* v. *Trubow*, 196 F. 2d 161; *Waialua Agr. Co.* v. *Maneja*, 178 F. 2d 603 certiorari denied 339 U. S. 920; and *Steccone et al.* v. *Morse-Starrett Products Co.*, 191 F. 2d 197. See also, *Ordinary of State of New Jersey* v. *United States Fidelity & Guaranty Co. of Baltimore, Md.*, 136 F. 2d 536 (C. A. 3), and *Woodruff* v. *Heiser*, 150 F. 2d 873 (C. A. 10), certiorari denied 326 U. S. 778.

III

Even if the exemption issues are presented for decision on this appeal it is clear that sections 13 (a) (1) and 13 (a) (2) are inapplicable

A. The messhall and lodging facilities at the Anaconda Mine do not constitute a "retail or service" establishment within the meaning of Section 13 (a) (2)

If it is assumed *arguendo* that the undecided exemption questions are properly before this Court, we submit that the messhall and lodging facilities clearly do not constitute a "retail or service" establishment within the meaning of the Section 13 (a) (2) exemption. The Supreme Court has repeatedly emphasized in decisions under this Act that "Exemptions made in such detail preclude their enlargement by implication." See *Addison* v. *Holly Hill Co.*, 322 U. S. 607, at 617, rehearing denied, 323 U. S. 809. "Where exceptions were made, they were narrow and specific. * * * Such specificity in stating exemp-

tions strengthens the implication that employees not thus exempted * * * remain within the Act" (*Powell* v. *United States Cartridge Co.*, 339 U. S. 497, at 517). This principle was specifically applied by the Court to the "retail establishment" exemption in *Phillips Co.* v. *Walling,* 324 U. S. 490 which, in fact, was the first decision in which the Supreme Court announced that an exemption from this Act is to be "narrowly construed" and not extended to "other than those plainly and unmistakably within its terms and spirit" (324 U. S. at 493).

It is our position that the messhall and lodging facilities here, designed solely for the benefit of the Anaconda mining employees to promote that company's productive operations, fall outside both the letter and the purpose of the exemptive provisions. The language and the legislative history of Section 13 (a) (2), ~~discussed in our main brief~~, controlling decisions, particularly that of this Court in *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101, and the administrative interpretation of the exemption provision here involved, reveal plainly what is now settled law—that a "service establishment" is one "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods" (*Fleming* v. *A. B. Kirschbaum Co.,* 124 F. 2d 567, 572 (C. A. 3), affirmed 316 U. S. 517) and that it is an establishment, "the principal activity of which is to furnish service to the consuming public" (*ibid.*). As the Third Circuit pointed out, "typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops" (*ibid.*); correspondingly typical service establishments are "barber shops, beauty parlors, shoeshining parlors, clothes pressing clubs, laundries, automobile repair shops," or the like.

As in the case of coverage presented in our main brief, we submit that this Court's decision in the *Consolidated Timber Co.* case, *supra,* and the Eighth Circuit's decision in *Hanson* v. *Lagerstrom,* 132 F. 2d 120, are controlling here. In rejecting a claim for exemption identical to that of the appellees here, this Court, in the *Womack* case at page 107, said:

> In our opinion the exemption invoked was not intended to apply in a situation such as confronts us in the instant case. Here the cookhouse was a "necessary"

part of the Company's production of goods for commerce. It was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate commerce. The cookhouse was not a separate or independent establishment; it was actually a part of the Company's facilities—a link in the chain—whereby it accomplished the purpose of its existence. Neither cookhouse was in competition with any private restaurant for there is no evidence of an effort to secure the patronage of the general public; the service was sold at cost to those whom the cookhouse was intended to serve: the loggers. *The principal activity of the cookhouse definitely was not to furnish service to the consuming public, as such, but was to serve the employees of the Company.* [Emphasis supplied.]

Appellees' insistence (App. br. p. 62) that the "messhall" is a "restaurant" and that the conceded exception for the latter impels exemption for the former, mistakes nomenclature for reality. Unlike cookhouses and messhalls, ordinary restaurants exist to serve the general public rather than to facilitate the productive operations of a particular company. Restaurants are operated for profit, are located at readily accessible sites in a community, and through advertising and other means seek to attract the patronage of the public as a whole. Appellees' facilities, on the other hand, are operated primarily to provide food for the miners; they are subsidized by the Anaconda Company (Fdg. 16, R. 64–65) as integral parts of the main business of mining rather than as separate entities operated by restauranteurs to serve meals to guests. Meal times are adjusted principally to accommodate the needs of the employees of Anaconda whose mine operates on a two-shift basis and whose mill operates on a three-shift basis (Fdg. 3, R. 57). Employees in the mine whose duties make it impractical for them to leave the working area eat their lunches at their place of work (Fdg. 15, R. 64). Approximately 20 to 25 percent of the meals served by appellees consist of box lunches (Plf. Exh. C, R. 49). To a very limited extent and only incidentally does

the messhall serve outsiders (Fdg. 1, R. 53). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities (Fdg. 5, R. 57).[3] Indeed, a sign on one of the access roads to the Anaconda properties warns "children and unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86).

Appellees attempt to portray the messhall as a restaurant by pointing out the fact that it is open to the public (br. p. 71). But the court below specifically found that only occasionally and incidentally are persons other than employees of Anaconda served at the messhall (Fdg. 1, R. 53). And under virtually identical circumstances, this Court rejected such a contention in the *Womack* case holding that the fact that meals at the cookhouse were served to occasional persons who were not employees of the logging camp did not convert the cookhouse into a public restaurant or service establishment. There the district court had held that the cookhouse located at the company's headquarters in Glenwood was exempt because it was frequented by a few members of the public. This Court, in reversing, pointed out that the distinction was not fundamental, and that both cookhouses served "the same basic purpose and integration in the Company business":

> If there be any difference, it is but of degree. Each accomplishes the same purpose, each is a unit in the facilities necessary to the Company's production of goods for commerce. The argument that because the Glenwood cookhouse is situated in a village wherein is also located a lunch counter or fountain equipped with a half dozen stools, serving sandwiches and coffee, is not persuasive. No such establishment could supply the necessary meals required by several hundred hungry laborers 132 F. 2d 101 at 107).[4]

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[3] Only Anaconda "advertises" the facilities, and then the "advertising" is not for the purpose of attracting the public but for the purpose of attracting an adequate supply of labor for its mining operations (Plf. Exh. AA, R. 51).

[4] In the *Womack* case there were six persons who were not employed in the logging operations but who were employed in other businesses in Glenwood who regularly took their meals at the cookhouse. In addition an average of 10 meals a day were served to strangers—the general public [132 F. 2d at 106]. In the instant case an average of only 168 meals per month or 5¾

And in *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C. A. 8), the facts reveal that from 4 to 6 meals a day were served to the public. The Eighth Circuit, however, made short shrift of defendant's contention there that under these circumstances the cookhouse was a service or place of retail business. Said the court at page 122:

> * * * In other words, the service to the public was incidental and so negligible and relatively unimportant that the exemption involved cannot apply.
>
> * * *
>
> * * * If, among his activities, defendant maintained a restaurant operated without reference to his industrial activity, it should then not be regarded as part of his business subject to the Act. The cookhouse was intended primarily for the benefit of defendant's logging employees and to increase his production operations. It is certainly not a typical retail establishment.

That the ruling of the *Womack* and *Hanson* cases is still controlling and authoritative with respect to the applicability of Section 13 (a) (2) to cookhouses in isolated logging or mining camps was made clear in the legislative reports on the 1949 amendments to the Act. Thus, Senator Holland, who sponsored the adopted amendment made the following remarks:

> Mr. Holland. The amendment which we have introduced has been a product of several months work and discussion. It was placed in its present form some 2 months ago and has had wide circulation. I have had numerous inquiries as to its effect upon various situations and its effect upon various court decisions. I have been asked the following questions:
>
> * * *
>
> Question. In *Boutell* v. *Walling* (327 U. S. 463) the Supreme Court held that a repair establishment, affili-

meals per day were served to outsiders (Fdg. 5, R. 57). In addition, the lodging facilities here are limited exclusively to employees of the Anaconda Company (Fdg. 5, R. 58).

> ated with an interstate motor carrier and engaged exclusively in repairing the trucks of such motor carrier was not exempt as a service establishment. Would that case be decided any differently under the proposed amendment?
>
> ANSWER. No; for the reason that the servicing of such a repair establishment would not be recognized as retail in the industry. This is so because such establishment is not open to the general public *and is really the same as a repair department operated by the interstate motor carrier itself.* A repair establishment affiliated with an interstate motor carrier is not like a garage patronized by auto and truck owners generally (95 Cong. Rec. 12505, August 30, 1949). [Emphasis supplied.]

That this is a general principle, not restricted to this one situation, but applicable equally to other similarly affiliated facilities is made clear by the generality of the language in the Report of the Majority of the Senate Conferees where it is stated:

> The conference agreement exempts establishments which are traditionally regarded as retail. Establishments which are not ordinarily available to the general consuming public (such as the motor-carrier repair affiliate considered in *Boutell* v. *Walling* (327 U. S. 463) * * * will not become retail or service establishments under the provisions of the conference agreement" (95 Cong. Rec. 14877, October 18, 1949).

Similarly, Mr. Lesinski, one of the managers on the part of the House, in explaining the effect of the amendments after conference agreement stated:

> The conference agreement does not change the status, insofar as the retail or service exemption is concerned, of establishments which are not ordinarily available to the general consuming public (95 Cong. Rec. 14942, October 18, 1949).

Appellee cites at great length those portions of the legislative history which admittedly indicate that sales of an establish-

ment are not *necessarily* to be regarded as nonretail because made to a business customer (br. pp. 67–70, appendix pp. 4–8). But these excerpts do not meet the issue here involved. What is important here is the legislative history clearly showing that where, as in the *Womack* and *Hanson* cases and in the instant case, an establishment is operated as an adjunct to the principal business of an employer and does not serve the consuming public generally, it is not the type of establishment contemplated by the amended Section 13 (a) (2), since there is no concept of retailing applicable to its sales or services.

The administrative interpretation of the amended "retail establishment" exemption is, of course, squarely contrary to appellee's contention. Those interpretations are contained in a comprehensive interpretative Bulletin, "Retail and Service Establishment and Related Exemptions," 29 CFR, 1953 Supp., 779; 15 F. R. 7245. There on the basis of "(1) The legislative history of the exemption as originally enacted in 1938 and the legislative history of the 1949 amendments to the exemption; (2) the decisions of the courts during the past eleven years, and (3) the Administrator's experience during the past eleven years in interpreting and administering the exemption" (Section 779.8 (f)), the Administrator has set forth certain standards and criteria for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries. Specifically with respect to isolated lumber camps or mines which maintain cookhouses and bunkhouses to feed and house their employees it is stated:

> * * * In those cases the employer operates an adjunct which is directly related to the principal business and the furnishing of the facilities is an integral and an indispensable part of the principal operations. Failure to provide such facilities would make continued operations virtually impossible. In such situations the employer does not satisfy the wants of the employees as part of the general consuming public but in order to enable him to carry on his business. Such establishments are not retail or service establishments within the meaning of the exemption (Section 779.9 (d)).

The terms of the statute and the legislative history show clearly that it was properly the function of the Administrator to interpret, as he did here, the exemption provision in question, and that the industry may not provide exemption for itself by a unilateral decision of what it recognizes as retail. "Recognized * * * *in* the particular industry" [emphasis supplied] is language carefully chosen. It does *not* mean, nor was it ever intended to mean, recognized *by* the particular industry. This was made clear by the explanation of Senator Holland, the sponsor of the section as it now appears in the Act. When responding to Senator Aiken's inquiry "Who does the recognizing?," Senator Holland explained: "The Administrator, the courts, the merchant, his employees, the enforcement officer, and everyone else." Senator Aiken asked:

> Then we have the Senator's assurance that this wording is clearly not intended to permit any industry to determine for itself what are generally recognized as retail sales?
>
> Mr. HOLLAND. No. We discussed that matter earlier in the afternoon. There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply (95 Cong. Rec. 12510).

Senator Aiken, who became one of the Managers on the Part of the Senate who made the Conference Report of the amendments as enacted, then added: "If these words would permit each industry to decide for itself whether sales were retail or not, I could see considerable objection to the amendment" (95 Cong. Rec. 12510).

It is thus unmistakably clear from the legislative history that the application of this exemption is not to be resolved solely on the basis of the self-interested opinions of the industry claiming the exemption on behalf of a particular employer. In response to fears expressed by some of the Senators that interested trade associations or employers would determine what is "retail" in their industries, Senator Holland made repeated assurances that while the trade association's interpretation

might be "one criterion," no one "and certainly not the Senator from Florida [the main sponsor of the provision as enacted], would wish to delegate full authority in the matter to a trade association or any other interested group" (95 Cong. Rec. 12501). For a more comprehensive discussion and excerpts from the debates see the Department's Interpretative Bulletin on this exemption, 29 CFR, 1953 Supp., 779.8. According to Senator Holland, it was contemplated that it would be the function of the Administrator to make the initial determination of what is recognized as retail in a particular industry, basing his decision on a variety of considerations, including matters of common knowledge, his own judgment derived from his specialized experience, trade association views and practices, and also the views of the "employee who has rights under the bill, if he sees something happening in the name of retail business which he knows is not retail business * * *" (95 Cong. Rec. 12510). In this connection, it may be noted that it is most unlikely that the employees in appellee's messhall and lodging facilities at the remote and isolated Anaconda mine would regard their services as "retail."

In answer to a question by Senator Douglas inquiring who is to define what is recognized as retail sales or services in the particular industry, Senator Holland replied "Who but the Administrator?" (95 Cong. Rec. 12501), observing that there would, of course, always be "access to the courts" if the individual person concerned did not regard the administrative ruling sound (*ibid*). Representative Lucas, commenting on the practical difficulties involved in determining the question of recognition in the particular industry said:

> The other charge against my amendment has been that it would make the exemption difficult, if not impossible, to apply, because years of litigation would be required to ascertain what is recognized as a retail sale in various industries. This charge is completely baseless. The Administrator, through his 11 years of administration of the existing law has come to know quite well what sales and services are recognized as retail in each particular industry (95 Cong. Rec. 11116).

The net import of the legislative debates on this point clearly reflects the intent to give particular weight to the interpretation of the Administrator who is in a position to receive the variety of interested views, and to acquire the specialized experience reflecting a much broader base from which to make an informed judgment of the actual practices in the industry than the district court can possibly acquire from a single case. In this special situation, therefore, there is particularly forceful reason for giving to the administrative interpretation the great weight commended by the Supreme Court in *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140:

> * * * the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. * * *
>
> We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.

The sparse evidence adduced by appellee in support of the claimed exemption is wholly insufficient to controvert the application of the Administrator's administrative interpretation to the instant case. It is no more than an effort to substitute for the Administrator's judgment in defining the meaning of "retail" the judgment of an interested member of the industry. In addition, even this meager evidence must be appraised in the light of the basic principle governing every exemption from this Act—that "the employer has the burden of proof on that issue." *Helliwell* v. *Haberman*, 140 F. 2d 833, at 834 (C. A. 2), specifically approved on this point in *Walling* v. *General Industries Co.*, 330 U. S. 545, at 548, n. 7.[5]

[5] That the employer has a strict burden of proving a claim of exemption from this Act has been repeatedly emphasized by the courts of appeals, including this Court. See *Lassiter* v. *Guy F. Atkinson*, 162 F. 2d 774 at 778 (C. A. 9); *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101 at 106 (C. A. 9); *Fletcher* v. *Grinnell Brothers*, 150 F. 2d 337 (C. A. 6), cited with approval

The burden of proof rule has particular significance in construing the amended "retail establishment" exemption in Section 13 (a) (2), because Congress, as evidenced by its debates and reports on this provision, explicitly indicated its reliance upon this rule to make the application of the exemption administratively workable. Specifically with respect to the requirement that the sales of the establishment claiming exemption be "recognized as retail * * * in the particular industry," it was emphasized that the burden of showing this factor was to be placed on each employer claiming the exemption. Thus, the statement of the Majority of the Senate Conferees on the Conference Report of the Amendments as enacted recites unequivocally:

> It is the intent of the conference agreement to place on each *employer* claiming the exemption the *burden* of showing that 75 percent of the particular establishment's sales are not for resale *and* are recognized as retail in the particular industry (95 Cong. Rec. 14877). [Emphasis supplied.]

Further, Section 13 (a) (2) in precisely its present form was offered on the floor of the Senate by Senator Holland, of Florida, on behalf of himself and five other Senators. See 95 Cong. Rec. 12490–12491. In explanation of this amendment Senator Holland stated:

> * * * An *employer* claiming exemption would have the *burden* of proving to the courts that, in fact, 75 percent of his sales or services are recognized as retail in his industry (95 Cong. Rec. 12502). [Emphasis supplied.]

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on this point in *Walling* v. *General Industries Co.*, 330 U. S. 545, at 548, n. 7; *Armstrong Co.* v. *Walling*, 161 F. 2d 515 (C. A. 1); *Stanger* v. *Vocafilm Corporation*, 151 F. 2d 894, 162 A. L. R. 216 (C. A. 2); *Grant* v. *Bergdorf & Goodman Co.*, 172 F. 2d 109 (C. A. 2); *Richter* v. *Barrett*, 173 F. 2d 320 (C. A. 3); *Walling* v. *Morris*, 155 F. 2d 832 (C. A. 6); vacated on other grounds, 332 U. S. 422; *Tripp* v. *May* (not officially reported), 10 W. H. Cases 1; 19 Labor Cases, par. 66,073 (N. D. Ill., 1950), affirmed 189 F. 2d 198 (C. A. 7); *Smith* v. *Porter*, 143 F. 2d 292 (C. A. 8), specifically approved on this point in *Walling* v. *General Industries Co.*, 330 U. S. 545, at 548, n. 7; *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. A. 8).

The proposed amendment of Senator Holland was passed by the Senate without change. See 95 Cong. Rec. 12520.

Similarly, the chief proponent of this proposal in the House Representative Lucas, assured his colleagues:

> * * * The *employer* claiming exemption would have the *burden* of proving that at least 75 percent of his sales are recognized as retail in his industry (95 Cong. Rec. 11116). [Emphasis supplied.]

Appellee plainly did not meet this burden of proof. Its evidence on this point consisted entirely of testimony concerning the self-serving position taken by the industry. Thus, Mr. Armin Kusswurm, Secretary of the National Restaurant Association, testified that the "Anderson operation" falls within the Association's definition of "restaurant" as defined in the Association's bylaws (R. 150); that the "Anderson organization" is a member of the Association and that "in the restaurant industry a retail sale is a sale or service of a meal to the consumer, and generally consumed on the premises of the establishment" (R. 154). Under this definition he stated that the function performed by the Anderson facility would be considered retail sales or services.

Appellees assert that evidence was also offered showing that the United States Census Bureau and the United States Office of Price Administration during its existence recognized that appellees' sales and services are retail sales or services in the industry (App. br. p. 63). Here again the "evidence" to which appellee refers consisted solely of Mr. Kusswurm's expression of *his* opinion that the Anderson facilities would be included under the designation of "In-plant Food Service Contractor" as listed by the Bureau of Census in its classification of retail trades, and *his* opinion that the Anderson facility would come under the designation of "On-the-job feeding or industrial feeding", a term employed by the Office of Price Administration for obtaining statistics for purposes of food rationing (R. 153–154). Even Mr. Kusswurm recognized that an eating establishment could be non-retail under certain circumstances, as is apparent from the colloquy between him and the court which appears on pages 154–155 of the record.

In addition, it was revealed upon cross-examination that Mr. Kussworm also acts as general counsel for the Association and that he had corresponded with appellees over a period of time in connection with the instant case (R. 156). Under these circumstances his testimony could hardly be considered disinterested and unbiased.

Appellant's only other witness on the exemption issue was Mr. William D. Bradford, secretary of the Southern California Restaurant Association. It was stipulated that this witness' testimony would be to the same effect as that of Mr. Kusswurm regarding the position taken by the industry in the Southern California area (R. 160, 161).

B. Appellees' employees engaged in the operation of the messhall and lodging facilities for employees at the Anaconda mine are not employed in a "local retailing capacity" within the meaning of Section 13 (a) (1)

Appellees' employees were not employed in a "local retailing capacity" within the exemption provided by Section 13 (a) (1) any more than they were employed by a "retail or service establishment" under Section 13 (a) (2). Both the terms and the context of Section 13 (a) (1) clearly indicate that it is limited to "local retailing" of the same character as that carried on by a "retail or service establishment." Indeed, the Supreme Court has expressly recognized that the two exemptions are merely complementary and were intended to exempt only employees engaged in traditionally "local retailing" capacities. Thus, it stated in *Phillips Co.* v. *Walling*, 324 U. S. 490 at 497:

> * * * Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store. * * * Section 13 (a) (2) is a part of the Act *only* because of the fear that Section 13 (a) (1), in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

Section 13 (a) (1), as in the case of Section 13 (a) (2), refers to retail sales or services to the general consuming public, and not to services which are an essential and integral part of the production or manufacturing process. As pointed out *supra*, as well as in the Government's main brief on the coverage question, the furnishing of the messhall and lodging facilities in the instant case is plainly not for the general consuming public. It is, on the contrary, simply an essential part of Anaconda's mining operation, i. e., a component of interstate production and not local retailing. As the Supreme Court held in *Roland Electrical Co.* v. *Walling*, 326 U. S. 657, it was plainly not contemplated that the exemption should apply to the furnishing of goods and services which constitute an integral part of the production operations of a producer of goods for commerce. Thus, it stated:

> To fail to cover in this Act the multitude of employees who are engaged in establishments like that of the petitioner and which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce would take the heart out of the Act (326 U. S. at 658).

See also this Court's decision in *Consolidated Timber Co.* v. *Womack*, 132 F. 2d 101, and *Hanson* v. *Lagerstrom*, 133 F. 2d 120 (C. A. 8), discussed *supra* at pp. 8–11.

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